Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-184 OF 1994
GOPAL SRI RAM, NH CHAN AND MAHADEV SHANKAR JJCA
8 APRIL 1997

Civil Procedure *— Appeal — Interference by appellate court — Principles applied — Whether appellate court ought to interfere*

Both the appellant and respondent were involved in the practice of medicine located in the same building, but on different floors. The respondent claimed against the appellant on the tort of nuisance. The respondent complained that he was deprived of the beneficial enjoyment of his premises by reason of the emission of noxious fumes from the premises occupied by the appellant. The learned trial judge held in the respondent's favour and awarded damages and granted a perpetual injunction restraining the appellant from continuing the nuisance in question. Against this decision, the appellant appealed.

Counsel for the appellant submitted that on the totality of the evidence, there was absent any connection in point of causation between the appellant and the noxious fumes that had invaded the respondent's premises as there had been another possible source of the noxious fumes; and that the issues in the case ought to be resolved in the appellant's favour. Counsel for the respondent pointed out that it had never been the appellant's case in the court below that there had been another source of the noxious fumes in question.

Held, dismissing the appeal:

The issue of another possible source of the noxious fumes was rightly not considered by the learned trial judge as it was not addressed before her at the court below.

This appeal turned upon a pure question of fact based upon the credibility of the witnesses who gave their evidence at the trial. The function of determining where the truth lies, on a balance of probabilities, is entrusted by law to the trial court. Unless the appellate court is convinced that there was no judicial appreciation of the evidence by the trier of fact, or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made do not accord with the probabilities of the case when taken as a whole, it would not be open to the appellate court to intervene and upset the findings made by a trial judge. The judgment under appeal did not contain any error warranting appellate interference. On the other hand, the learned judge had done all that was required of her by law (see p 379C–F).

[Bahasa Malaysia summary

Kedua-dua perayu dan penentang terlibat dalam amalan perubatan yang terletak dalam bangunan yang sama, tetapi pada tingkat

berlainan. Penentang membuat tuntutan terhadap penentang atas tort kacau-ganggu. Penentang mengadu bahawa dia tidak dapat menikmati premis secara benefisial disebabkan pengeluaran wasap bisa daripada premis yang diduduki oleh perayu. Hakim perbicaraan yang arif membuat keputusan memihak kepada penentang dan mengawardkan ganti rugi dan memberikan suatu injunksi berkekalan yang melarang perayu daripada meneruskan kacau-ganggu berkenaan. Perayu membuat rayuan terhadap keputusan ini.

Peguam perayu berhujah bahawa atas keseluruhan keterangan, tidak terdapat sebarang kaitan berkenaan penyebaban antara perayu dan wasap bisa yang melanda premis penentang oleh kerana terdapat satu lagi sumber wasap bisa yang mungkin; dan bahawa isu-isu dalam kes patut diselesaikan memihak kepada perayu. Peguam penentang berhujah bahawa ia tidak pernah merupakan kes perayu di mahkamah bawah bahawa terdapat satu lagi sumber wasap bisa berkenaan.

Diputuskan, menolak rayuan:

Isu tentang satu lagi sumber wasap bisa yang mungkin tidak dipertimbangkan secara betul oleh hakim perbicaraan yang arif kerana ia tidak dikemukakan di hadapan beliau di mahkamah bawah.

Rayuan bergantung kepada persoalan fakta semata-mata berdasarkan kebolehpercayaan saksi-saksi yang memberi keterangan mereka di perbicaraan. Fungsi menentukan di mana kebenaran terletak, atas imbangan kebarangkalian, ditugaskan oleh undang-undang kepada mahkamah perbicaraan. Hanya jika mahkamah rayuan berpuas hati bahawa tiada penilaian kehakiman ke atas keterangan oleh pembicara fakta, atau bahawa manfaat pandang dengar yang dikhaskan kepada seorang hakim perbicaraan terlepas perhatian atau pendapat yang dibuat tidak sejajar dengan kebarangkalian kes apabila diambil secara keseluruhan, adalah tidak terbuka kepada mahkamah rayuan untuk campur tangan dan mengganggu pendapat yang dibuat oleh hakim perbicaraan. Penghakiman yang dirayu tidak mengandungi sebarang kesilapan yang memerlukan campur tangan kuasa rayuan. Sebaliknya, hakim yang arif telah melakukan segala yang dikehendaki oleh undang-undang (lihat ms 379C–F).]

Notes

For cases on interference by an appellate court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 465–469.

Cases referred to

Chan Kok Kiang v Tan Swan Cheng & Anor [1970] 2 MLJ 253 (refd)
Ladd v Marshall [1954] 3 All ER 745 (refd)
Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70 (refd)
Rylands v Fletcher (1868) LR 3 HL 330; [1861–73] All ER Rep 1 (refd)

Appeal from: Civil Suit No S4–22–35–92 (High Court, Kuala Lumpur)

PS Ranjan (*MS Dhillon* and *V Sumitra* with him) (*PS Ranjan & Co*) for the appellant.

Joginder Singh (*Joginder Singh & Co*) for the respondent.

Gopal Sri Ram JCA (delivering the judgment of the court): This appeal is directed against the decision of the High Court at Kuala Lumpur delivered on 20 August 1994 in an action brought by the respondent before us as plaintiff against the appellant as defendant. At the conclusion of arguments before us, we dismissed the appeal. The reasons for our decision now follow.

The respondent's claim against the appellant is based on the tort of nuisance. The substance of the respondent's complaint is that he was deprived of the beneficial enjoyment of his premises by reason of the emission of noxious fumes from the premises occupied by the appellant. Both the appellant and respondent are involved in the practice of medicine. The appellant operates a renal clinic at which patients receive haemodialysis. The respondent uses his premises as a clinic and hospital for treating ear, nose and throat ailments. Both facilities are in the same building, but on different floors. The appellant's clinic is located on the floor above the respondent's premises — directly above the reception area of the respondent's clinic.

Haemodialysis is a process that calls for the use of chemicals. One such chemical is formalin. Another is renalin. These are chemicals with a powerful odour. Exposure to their fumes is harmful to health. About this, there is no dispute.

The respondent came into occupation of his premises some 18 years before the appellant commenced its operations. Throughout this period, there was no complaint of the present nature either by him, his staff or his patients. It was only after the arrival of the respondent that the appellant, his staff and patients began to experience discomfort. According to the respondent and his witnesses, all of whom were believed by the trial judge, the harm they suffered was of a serious nature. We think it appropriate to quote the following passage from the respondent's evidence in which he described the nature of the discomfort that he suffered:

> I may not look sick but in the last 2–3 years my skin has become very dry. My eyes are often red and swollen. I go home with puffy eyes. My eyelids are painful due to chronic exposure. I am suffering from skin disease.
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> I have consulted a skin specialist three times this year. I suffer three types of effects: first, the acute alticules which are a daily affair. Second, the sub-acute attacks. Third, the chronic effects.
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> The acute attacks occur in the morning; when I get into the office, within a few hours, my eyes smart. They become uncomfortable. There is a burning sensation in my nose, my throat and my tongue goes numb. Then I get a sort of discomfort behind my chest bone and I find it difficult to breathe. I have a contracted feeling in my chest. I can't breathe. I don't feel well.

...

At certain times of the day, if I enter my room when the concentration of the gas is high, I get goose-flesh, ie virtually like hair standing on end and not infrequently I get headaches. There are the acute daily attacks that I suffer.

The second type are the ones of which I feel the cumulative effect. The effect of a toxic gas depends on: (1) the dose of gas; (2) the type of gas; and (3) the duration of exposure to gas. So at the end of the day, I feel very tired and giddy. There are times when I have collapsed in the house.

In the court below, the appellant resisted the claim on three principal grounds, namely:

(1) that it did not emit the noxious fumes in question;

(2) that the acts complained of did not amount to a nuisance; and

(3) that none of the acts complained of caused the annoyance, discomfort and injury alleged by the respondent.

The learned trial judge, after a careful review of the evidence and the argument of counsel held in the respondent's favour. She awarded damages of RM40,000 and granted a perpetual injunction restraining the appellant from continuing the nuisance in question. Against this decision, the appellant appealed to this court.

When the appeal was called on for hearing, there were four motions before us. Two of them were filed by the appellant and two by the respondent. The respondent's motions were, as properly submitted by his counsel En Joginder Singh, merely consequent upon the appellant's.

The first of the appellant's motions is dated 5 September 1995. By it, the appellant sought two orders: first, to adduce further evidence to show that the appellant had, immediately following the judgment in the court below, removed the alleged deleterious substances from its premises; second, to admit the affidavit of one Foo Chin Jin who was the respondent's second witness (DW2) at the trial of the action to amend a portion of the note of his evidence as recorded by the learned trial judge which is allegedly inaccurate in that it does not reflect what he had actually said at the trial. The evidence complained of is an admission by DW2 which he now says he never made. It appears at p 417 of the record of appeal (p 367 of the printed note) and reads as follows:

I agree that there is an intolerable level of toxic gas in the plaintiff's premises.

The appellant's second motion is dated 17 January 1996. By it, the appellant sought to adduce further evidence from one Dr Abdul Rahim Rahman Hamzah who had given a report dated 4 December 1995 — that is to say, about eight months after the learned judge had handed down her decision in the action.

After hearing arguments, we exercised our discretion and declined, with costs, both motions by the appellant. There are serious impediments that lie in their way.

In respect of the application to adduce evidence of matters that had occurred since judgment — namely, that the offending substances had been removed from the premises under the appellant's occupation — this was hotly disputed by the respondent in the first of its motions. Permitting the appellant's application would have meant the conducting of a fresh trial on an issue the relevance of which was both remote and tenuous. It must be borne in mind that the appellant's purpose in asking for the reception of the fresh evidence was to rid itself of the injunction granted after trial. The argument here was that since the deleterious substances had been removed, there was no need for an injunction. But surely this argument is met by the proposition that if the offending substances had been removed, then the appellant need have no fear of the injunction. On the other hand, if the injunction were, on the basis of any fresh evidence, to be dissolved, the harm to the respondent would be very real in that the appellant would then be at liberty to once again bring the offending substances onto the premises. This would result in the respondent undertaking a fresh burden of making another application to reinstate the injunction. Having regard to all the relevant circumstances of the case, we came to the conclusion that the balance of justice lay in favour of refusing the first prayer in the appellant's first motion.

As regards the second prayer in the first motion, namely, to correct the evidence of DW2 in the passage earlier reproduced, we found the application to be contrary to established procedure and entirely unwarranted. So far as procedure is concerned, we need look no further than the decision of the Singapore Court of Appeal in *Chan Kok Kiang v Tan Swan Cheng & Anor* [1970] 2 MLJ 253, cited to us by En Joginder Singh. There, Wee Chong Jin CJ said (at p 254):

> It is not the practice of the courts in Singapore [and we add that the same may be said of courts in Malaysia] to have a *verbatim* shorthand note taken of the entire proceedings in court. If it is intended that any note taken by counsel at the trial of an action be accepted as part of the notes of evidence for use by an appellate court, it is desirable that the trial judge and counsel for the other party or parties should be supplied at the earliest possible opportunity with a copy of the note so made for correction or acceptance or otherwise. If the trial judge and counsel for all parties agree to the original or a corrected version, then such agreed original or corrected version can properly be included in the record of appeal as part of the notes of evidence. Where no version can be so agreed, then in any application for leave to include the note made or taken by counsel at the trial, the affidavit in support of the application ought to set out the circumstances under which the note was made or taken and the steps taken to obtain the agreement of all concerned together with all correspondence relating to the attempt to obtain such agreement.

We entirely agree with this passage. It provides a complete answer to the appellant's first motion. But there is a more compelling reason for refusing the order sought. A careful perusal of the record reveals that at the trial, En Joginder Singh had, in a written note of his submissions, referred to and relied upon the admission made by DW2 with no protest whatsoever

from En Ranjan who appeared for the instant appellant in the court below. To compound matters, the record also reveals that En Ranjan had himself referred to the very same page of the printed note of the evidence at which DW2's admission appears. When we drew this to En Ranjan's attention, he frankly conceded that he ought to have raised this matter with due diligence in the court below and that he had not done so. In these circumstances, it certainly does not lie in the mouth of the appellant to now contend that the learned trial judge had made an error in recording DW2's evidence.

Turning now to the second motion, we formed the view that the application to adduce the evidence of Dr Abdul Rahim Rahman Hamzah did not meet the requisite test. That test was formulated by Suffian FJ (as he then was) in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 in the following terms (at p 71):

> To justify the reception of this evidence, three conditions must be fulfilled:
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> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
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> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
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> Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

Ladd v Marshall [1954] 3 All ER 745 was cited by his Lordship as authority for the proposition.

In the present case, the first of the three conditions adverted to by Suffian FJ was found to be absent. On the contrary, we came to the conclusion that had the appellant exercised reasonable diligence, the evidence now sought to be adduced could have been obtained from the witness concerned at the trial of the action. There was therefore no merit whatsoever in the second motion.

The dismissal of the appellant's two motions rendered academic the motions filed by the respondent. Accordingly, we made no order upon each of them. However, since their filing had been necessitated by the appellant's motions, we directed the appellant to also bear the costs thereby incurred.

So much for the interlocutory matters before us.

The substantive appeal, according to En Ranjan, turns upon the resolution of three questions which he submitted should be answered in the appellant's favour. These are:

(1) Did the appellant produce fumes on their premises in sufficient quantities so as to call them noxious?

(2) Was there an escape of these fumes?

(3) Was there any injury to the respondent or to the use and enjoyment of his premises?

A Encik Ranjan carefully took us through the evidence led at the trial. He drew attention to the fact that there was another medical facility known as Lablink in the same building from which the noxious fumes could have equally been emitted. It was submitted that on the totality of the evidence, there was absent any connection in point of causation between the appellant B and the noxious fumes that had invaded the respondent's premises. He complained that this aspect of the case had not received any or any sufficient attention from the learned trial judge.

After a careful consideration of the submissions advanced in support of and in opposition to the appeal, we came to the conclusion that the appeal lacked merit. As regards causation, En Joginder Singh rightly C pointed out that it had never been the appellant's case in the court below that Lablink had been the source of the noxious fumes in question. Small wonder, therefore, that the learned judge did not address her mind to this issue.

In our judgment, this appeal really turns upon a pure question of fact D based upon the credibility of the witnesses who gave their evidence at the trial. The function of determining where the truth lies, on a balance of probabilities, is entrusted by law to the trial court. Unless we, as a court of appeal, are convinced that there was no judicial appreciation of the evidence by the trier of fact, or that the audio-visual advantage reserved to a trial E judge had been missed or that the findings made do not accord with the probabilities of the case when taken as a whole, it would not be open to us to intervene and upset the findings made by a trial judge.

The judgment under appeal in the present instance does not contain any error warranting appellate interference. On the other hand, we are satisfied that the learned judge has done all that is required of her by law. F She has admirably analysed the material before her and drawn the inferences properly admitted by the evidence. She directed herself correctly upon the law of nuisance and the rule in *Rylands v Fletcher* (1868) LR 3 HL 330; [1861–73] All ER Rep 1. She evaluated the material placed before her with care and her conclusions of fact are reasonably supported by the G evidence. Having scrutinized the record of appeal with care, we are of the opinion that there was more than sufficient admissible evidence before the learned judge to warrant the three questions posed by En Ranjan being answered against the appellant. The learned judge resolved them against the appellant. We agree with her and would do likewise.

The appeal was therefore dismissed. The judgment of the learned H judge and the orders made by her were affirmed. We also ordered that the costs of the appeal be taxed and be paid by the appellant to the respondent. The deposit paid into court by the appellant was ordered to be paid out to the respondent to account of his taxed costs.

I *Appeal dismissed.*

Reported by Loo Lai Mee